

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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OCT 15 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

[REDACTED]

In the Matter of)	FCC 02-201
)	
Amendment of Section 73.202(b),)	MM Docket No. 98-112
Table of Allotments, FM Broadcast Stations)	RM-9027
(Anniston and Ashland, AL, College Park,)	RM-9268
Covington, and Milledgeville, Georgia))	RM-9384

To The Commission

**SECOND REQUEST FOR PROMPT CASE PROCESSING AND
SUBMISSION OF AN *EX PARTE* LETTER RECEIVED BY COUNSEL**

**PRESTON W. SMALL
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October 15, 2003

Preston W. Small (Mr. Small), by his attorney, hereby follows up its June 12, 2003 request for prompt action in this matter. Also, Mr. Small hereby submits a copy of an ex parte letter which does not appear to have been served on all parties to this proceeding. In support whereof, the following is respectfully submitted:

1) As we recited in our June 12, 2003 *Request for Prompt Case Processing*, in mid-December 2002 at the request of Cox Radio, Inc. the Commission held a meeting in which matters relating to MM Docket No. 98-112 and MM Docket No. 01-104 were discussed. During the course of the meeting counsel to Cox Radio, Inc. mused to the effect that by May 2003, perhaps Mr. Small would no longer be involved in MM Docket No. 98-112. Mr. Small is still in the proceeding, notwithstanding Cox Radio, Inc.'s counsel's wishful thinking.¹ Also at the December 2002 meeting the staff indicated that it felt that could issue a decision on Mr. Small's *Petition for Reconsideration* "shortly" and that the staff could not state that the *Petition for Reconsideration* raised "nothing."

2) Yesterday I received a copy of the attached letter that Senator Shelby sent to Chairman Powell requesting that action be taken in MM Docket 98-112 "on an expedited basis." 47 C.F.R. § 1.1202 provides that a prohibited *ex parte* presentation is one which "is intended . . . to influence the timing of a proceeding," but which is not served on the parties to the proceeding even if, as in the case of Senator Shelby's letter, a preference for a particular outcome in MM Docket 98-112 is

¹ As previously stated, perhaps Cox Radio, Inc.'s counsel felt that the civil suit in GA filed by WNNX, Inc.'s predecessor-in-interest, would be settled by May 2003 and that Mr. Small would have withdrawn from MM Docket No. 98-112. That eventuality has not materialized. The Federal court hearing the civil case (Civil Action File No. 3:02-CV-80 (HL), U.S. Dist. Ct., Middle Dist. GA, Athens Div.) has added Susquehanna Radio Corp., WNNX LICO, Inc.'s parent, as a third party defendant to the case for the purpose of allowing Mr. Small to explore, *inter alia*, whether Susquehanna Radio Corp. participated, with the party who brought the suit against Mr. Small, in a scheme to defraud Mr. Small and to explore whether Susquehanna Radio Corp. reneged on an agreement which required it to pay \$1 million to Mr. Small.

not expressed. The face of Senator Shelby's letter does not indicate that either Susquehanna Radio Corporation or WNNX LICO, Inc. were served with a copy of the Senator's letter. In order to protect the Senator, and his FCC regulated broadcast constituents, from a potential allegation arising in MM Docket 98-112 that the Senator's letter might pose a problem under the FCC's *ex parte* rules, we are providing a copy of the Senator's letter to Mr. Lipp in his role as counsel to Susquehanna Radio Corporation/WNNX. We think that proceeding in this manner ensures that the Senator's letter can be accepted by the FCC without even the appearance of an *ex parte* problem.²

3) Mr. Small understands that members of Congress provide constituent services which include contacting Federal agencies when it seems that a proceeding is not moving along at a reasonable pace and the Senator's letter requesting prompt action in MM Docket 98-112, aside from the arcane legal issue noted above, is right on the mark. Mr. Small's *Petition for Reconsideration/Second Motion to Reopen the Record* was filed on September 3, 2002. While Senator Shelby's letter does not state a preference for which party prevails in MM Docket 98-112, Mr. Small's preference for prevailing in MM Docket 98-112, and of obtaining a reversal of the Commission's decisions to date, is clearly stated in the record of MM Docket 98-112. Since the filing of our June 12, 2003 *Request for Prompt Case Processing* we have followed up with the staff in an effort to ascertain when the Commission expected to issue a decision in this matter, however, a time table for decision has not yet been announced.³

² We are also providing copies of the Senator's letter to the parties we have on our service list for the Alabama rulemaking proceeding, MM Docket 01-104, in case any party in that proceeding might desire to review the letter.

³ While Mr. Small has filed review pleadings in MM Docket 98-112, Mr. Small has also simultaneously sought prompt Commission decision making, such as by filing requests for Federal
(continued...)

4) Until this round of pleadings the Commission had handled the earlier review pleadings within about 7-8 months after the filing of the review pleading. At this point, because more than one year has passed since the *Petition* was filed, it appears that the decision making process has stalled and our goal, like the Senator's, is to try to get the Commission to respond promptly to the September 2002 *Petition for Reconsideration*. The Senator's letter expresses that some of his constituents are being delayed in their efforts to improve their stations because the action in MM Docket 98-112 might affect those stations. The Commission's purpose is to protect the frequency environment until MM Docket 98-112 is finally resolved, a protection not only for Mr. Small but for stations which might unnecessarily invest money in improvements which might later need to be returned to their original condition at a later date. While Mr. Small sincerely regrets that neighboring stations are being delayed, such delay results from a necessary need to protect the parties in MM Docket 98-112. Obviously, Mr. Small was not aware of any of the neighboring stations future plans when he opened MM Docket 98-112 in late 1996 and he has never intended to delay those stations for a moment for the mere purpose of delaying them.

5) For the Commission's convenience, here is a summary of the decision making history of this case:

a) *Report & Order*, 15 FCC Rcd. 9971 (2000), released April 28, 2000 (65 Fed. Reg. 31498, May 18, 2000) (erratum released May 2, 2000)--reconsideration filed June 16, 2000.

b) *MO&O*, 16 FCC Rcd. 3411 (2001) released Feb. 9, 2001 (66 Fed Reg. 14862, March 14, 2001 Fed Reg.)--reconsideration filed March 30, 2001.

³(...continued)

Register publication when it came to his attention that publication might be required and where publication had not occurred, as well as by requesting prompt case processing.

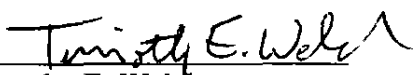
c) *MO&O*, 16 FCC Rcd. 19857 (2001); released Nov. 8, 2001 (March 30, 2001 reconsideration petition treated as an application for review and there was no Federal Register issuance)--reconsideration and motion to reopen the record filed Dec. 5, 2001.

d) *MO&O*, 17 FCC Rcd. 14830 (2002); released July 25, 2002 (67 Fed. Reg. 55729, Aug. 30, 2002 Fed. Reg.)--reconsideration and second motion to reopen filed Sept. 3, 2002.

6) It is now more than a year since Mr. Small's September 2002 *Petition* was filed and the Commission has not only not acted, the Commission has not made any visible effort to investigate the improper threats of civil litigation which were made against Mr. Small as recited in the *Petition*. We request that the Commission either promptly a) investigate the civil litigation matter raised in the September 2002 *Petition*, if investigation is required to decide the matter, and/or b) release a decision which covers the issues raised in the September 2002 *Petition*, including an explanation as to whether an investigation is required.

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Respectfully submitted,
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October 8, 2003

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Hon. Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
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Dear Chairman Powell:

This letter is to request that the Commission take action on its pending case in MM Docket No. 98-112, captioned *Anniston, Alabama, et al.*. I understand that this proceeding began nearly six years ago, but is not yet final.

Several of my constituents, who are the owners of radio stations in rural areas of Alabama, have informed me that the Commission's inaction in the Anniston case is preventing their stations from making modifications that are necessary for their survival. Specifically, Stations WZLM, Dadeville, Alabama, WJAM-FM, Orrville, Alabama, WSSY-FM, Talladega, Alabama, WEZZ-FM, Clanton, Alabama, WAYI, Thomaston, Alabama, and WFNU, Repton, Alabama have all filed applications for necessary changes in their facilities. The Commission has stated that no construction can commence on any of these stations until the Anniston case is final.¹

My constituents inform me that the construction and activation of the applied-for changes to the facilities of these radio stations is necessary for their viability, and when they are activated they will provide much needed radio service over large areas of underserved rural Alabama. However, before this can occur, the Commission must issue a final decision in its long-pending Anniston case. This case is before the Commission on its fourth reconsideration or review. It is long overdue for a final decision.

Consistent with all applicable laws and regulations, I request that you turn your attention to the Anniston case and take action in that case on an expedited basis. Thank you for your consideration.

Sincerely,



Richard Shelby

United States Senator

Cc: Timothy Welch

¹ Auburn, Northport, Tuscaloosa, Camp Hill, Gardendale, Homewood, Birmingham, Dadeville, Orrville, Goodwater, Pine Level, Jemison, and Thomaston, Alabama, 18 FCC Rcd 10333 (2003).

CERTIFICATE OF SERVICE

I hereby certify that I have this 15th day of June 2003 served a copy of the foregoing REQUEST FOR PROMPT CASE PROCESSING AND SUBMISSION OF AN *EX PARTE* LETTER RECEIVED BY COUNSEL by First-Class United States mail, postage prepaid, upon the following:

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